

**Before the
Federal Communications Commission
Washington, D.C. 20554**

<i>In the Matter of</i>)	
)	
Closed Captioning and Video Description of Video Programming)	CGB Docket No. 06-181
)	CC-0045
The Local Newspaper, Inc.)	

Directed to: Consumer and Governmental Affairs Bureau

Reply to Opposition

Westside Church Media Ministry (“Respondent”), by its attorneys, hereby respectfully submits its Reply to the March 2,2007 opposition (“Opposition”) filed by Telecommunications for the Deaf and Hard of Hearing, Inc. *et al.* (“Commenters”) in the above-captioned proceeding.’ The Commenters filed their Opposition to Respondent’s petition for an exemption from the Commission’s closed captioning requirements on the basis of undue burden (“Petition”), claiming that the Petition does not provide the requisite evidence necessary to support its request. While the Commenters’ submission is written as an opposition, it is in fact in the nature of a petition for reconsideration, as Respondent’s petition was granted on September 200,2006, by letter of the Chief, Disability Rights Office, Consumer and

¹ The *Public Notice*, “Extension of Comment Period on Petitions for Exemption from Commission’s Closed Captioning Rules; *Ex Parte* Treatment of Filings in Docket,” CG Docket No. 06-181, DA 06-2329, released November 21,2006 (“*Extension Public Notice*”) established March 27,2007, as the deadline for submitting comments and oppositions to petitions for exemption from the closed captioning rules. The *Extension Public Notice* also established a period for filing replies to such oppositions of 40 days in lieu of the usual period of 20 days from the close of the comment period established by Section 79.1(f)(6) of the Commission’s rules. Accordingly, this Reply is timely filed.

Governmental Affairs Bureau, Reference CGB-CC-0371 (the “Grant Letter”). While Respondent recognizes that the Commenters’ submission was made in response to the Commission’s *Public Notice*, “Consumer and Governmental Affairs Bureau Action Request for Exemption from Commission’s Closed Captioning Rules,” CG Docket No. 06-181, DA 06-2287, released November 7, 2006 (*“Exemption Request Public Notice”*), that *Exemption Request Public Notice* was released after the grant of the Respondent’s petition had become final, and the subsequent reconsideration request was therefore untimely. Moreover, the Petition, on its face, did provide sufficient evidence and the Commission should uphold its grant of the request. Although not necessary for affirmation of its grant, Respondent addresses 1) the Commenters’ misguided interpretation of the effectiveness of the current legal standard for a waiver of mandatory closed captioning and, 2) the sufficiency of the evidence presented in the Petition.

Discussion

I. The *Exemption Request Public Notice* Was Issued after Finality of the Grant of Respondent’s Petition and Therefore Could Not Effectively Hold that Action in Abeyance.

On December 30, 2005, Respondent filed its petition for exemption from the requirements of the Commission’s closed captioning rules based on undue burden. Thereafter, the Commission’s staff issued the Grant Letter, dated September 20, 2006. Section 1.4(b)(5) of the Commission’s Rules provides in the case of a document that is neither published in the Federal Register nor released to the public, and with regard to which a descriptive public notice is not released, the day to be considered as the date of “public notice” of that document is the date appearing on the document sent to the affected parties. In this case, as noted above, that date was September 20, 2006. Section 1.106 and the Communications Act of 1934, as amended, provide that any petition for reconsideration of an action taken by the Commission’s staff must

be filed within 30 days of the date of public notice of that action.² Furthermore, Section 1.117 of the Commission's rules states that it may, within 40 days of public notice, review on its motion any action taken pursuant to delegated authority.

In the instant case, as the date of the Grant Letter was September 20, 2006, that 40 day period expired on October 30, 2006. The *Exemption Public Notice*, however, was not released until November 7, 2006, eight days **after** the Grant Letter became a final action, no longer subject to reconsideration or review. While the *Exemption Public Notice* recognized that some of the listed petitions for exemption had already been granted and indicated that it was holding such actions in abeyance, it did not explain how it was possible to hold in abeyance grants that had already become final. While Respondent recognizes that the initial Grant Letter was issued without the requisite prior public notice, the fact remains that the Respondent's petition was granted, and the Commission did not act to rescind, stay, reverse, or otherwise hold in abeyance the grant until after the specified 40 day period had elapsed. The essential legal concept of

² Likewise, Section 1.115 of the Commission's Rules provides that any application for review of an action taken pursuant to delegated authority must be filed within 30 days of the date of public notice of the action. Respondent recognizes that Commenters on October 12, 2006, filed an Application for Review with respect to the decision in *Anglers for Christ Ministries, Inc. and New Beginning Ministries, Video Programming Accessibility, Petitions for Exemption from Closed Captioning Requirements*, Memorandum Opinion and Order, DA 06-1802, ¶ 7-8 (rel. September 12, 2006) ("Anglers Order"), and mentioned in that Application for Review all decisions based upon that decision should be rescinded. It must be remembered, however, that each petition for exemption is a separate proceeding with its own unique circumstances, and a blanket statement in one proceeding is ineffective to drag in other, separate proceedings. If the Commenters had wished to contest the findings of the Commission's staff with regard to Respondent's particular circumstances, it could and should have filed a separate Application for Review with regard to Respondent. Commenters cannot bootstrap these other grants into the single Application for Review. As discussed below, the Commission's decision in the Anglers Order remains applicable unless and until it is overturned.

administrative finality requires that the Commission be governed by its own procedural rules in such matters. Therefore, by the time that the *Exemption Public Notice* was released, the Grant Letter was no longer subject to being held in abeyance.

Furthermore, that *Public Notice* was ineffective in extending the time period for seeking reconsideration of the Grant Letter. As noted above, the time period within which an interested party must seek reconsideration of a Commission action is set by statute. Specifically, 47 U.S.C. Section 405(a) provides that any petition for reconsideration of any action taken by the Commission through delegated authority shall be filed within 30 days of the date of public notice of the action taken. Since this provision is statutory, it cannot be waived by the Commission. Thus, the Commission's notice that it intended to hold in abeyance its action in the Grant Letter, not issued until substantially after the time for seeking reconsideration of the Grant Letter had already expired, cannot extend the time period for seeking reconsideration of that action. Thus, Commenters' submission must be dismissed as an untimely petition for reconsideration.

11. The Standard for Review of Petitions for an Exemption from Closed Captioning Requirements Established in the *Anglers Order* is Currently Effective.

Section 713(e) of the Communications Act of 1934, as amended ("Communications Act") and Section 79.1(f) of the Commission's rules allow the Commission to grant a petition for **an** exemption to the closed captioning requirements upon a showing that meeting those requirements would impose an undue burden on the video programming provider or owner. Section 79.1(f)(2) sets forth four factors to be taken into account in determining whether captioning would give rise to an undue burden: (1) the nature and cost of the closed captions for the programming; (2) the impact on operation of the provider or program owner; (3) the financial

resources of the provider or program owner; and (4) the type of operation of the provider or program owner.³ The Respondent's Petition presented sufficient evidence to meet all four factors of these factors.

In a recent case involving the undue burden standard, similar to the instant case, the Consumer and Governmental Affairs Bureau ("the CGB") considered the petitions for closed captioning exemptions submitted by two video programming owners, Anglers for Christ Ministries, Inc. and New Beginning Ministries, Inc., in a consolidated Memorandum Order & Opinion. That decision states that Section 713 and its legislative history "evinced that the goal of ensuring that video programming is accessible to those with hearing disabilities must, in certain circumstances, be balanced against the economic burdens that closed captioning requirements present to the providers or owners of such programming" and highlights the existence of statutory categorical exemptions from captioning for ITFS programming and locally-produced, non-news programming with no repeat value.⁴ In granting the petitions before it, the CGB stated that it would be "inclined favorably" to grant petitions filed by non-profit organizations that do not receive compensation from video programming distributors for the airing of their programming and that, in the absence of an exemption, may terminate or substantially curtail the programming or other activities important to their mission.⁵

The Commenters, having filed an application for review of the *Anglers Order*, allege that

³ 47 C.F.R. §79.1(f)(2).

⁴ See *Anglersfor Christ Ministries, Inc. and New Beginning Ministries, Video Programming Accessibility, Petitionsfor Exemption from Closed Captioning Requirements*, Memorandum Opinion and Order, DA 06-1802, ¶ 7-8 (rel. September 12,2006) ("Anglers Order").

⁵ *Id.* at ¶ 11.

the CGB improperly created a new standard and that the Commission may not rely on this standard while the decision is under review. This contention is legally untenable and strains the limits of permissible advocacy. The decision of an administrative agency such as the Commission, with rulemaking and adjudicative powers, binds the affected parties and serves as legal precedent for similarly situated parties going forward. Further, Section 5 of the Communications Act provides that Bureau orders “shall have the same force and effect” as Commission action, under the general authority given to the Commission to delegate its functions.⁶ As to the effectiveness of a non-hearing Bureau order for which review has been sought, a longstanding Commission rule indicates that unless otherwise specified, orders are effective upon release unless the Commission, in its discretion, stays the decision during the completion of its review.⁷ The Commission has made no other specifications with respect to *Anglers Order*, nor did it issue a stay of the decision. Consequently, it is the applicable Commission precedent until such time as it is stayed or overturned by the Commission.

The mere appeal of a Commission order does not trigger an automatic stay, except in certain limited situations, carved out by statute (not applicable here). In the case *Application of WEAM Radio, Inc. and Viacom Broadcasting, Inc.*, the FCC declared and the Court of Appeals for the District of Columbia upheld that, “where an aggrieved party alleges that it will be harmed by the immediate effectiveness of a staff ruling, the appropriate remedy is to seek a stay of that action,” a remedy the Commenters did not seek.⁸ Without having undertaken this necessary and

⁶ See 47 U.S.C. §155(c).

⁷ See 47 C.F.R. §1.102(b)(2) (emphasis added).

⁸ A party desiring such an outcome must file a Motion for a Stay which meets a four-part test: (1) substantial likelihood of success on the merits, (2) irreparable harm, (3) no substantial harm to others and, (4) a stay would be in the public interest. See *Application of WEAM Radio, Inc. and Viacom Broadcasting, Inc.*, 1985 FCC LEXIS 3308, *6-7(1985), *aff’d* by Committee to

rigorous step *and* having received a grant from the Commission, the Commenters may not deny the effectiveness of the standard established in the *Anglers Order*.

In *Melody Music v. FCC*, the Court of Appeals for the District of Columbia held that similarly situated parties should not be subject to disparate treatment.⁹ The Commenters have failed to show how the Petition, and the facts therein, differ from the petitioners and the relevant circumstances described in the *Anglers Order*. As discussed above, the Commenters falsely assert that the Commission may not rely on the *Anglers Order* when deciding whether to grant undue burden petitions. Unfortunately for the Commenters, the opposite is true: *Anglers Order* is the standard by which such petitions must be analyzed and entities that demonstrate the same “confluence of factors” as those enumerated in the *Anglers Order* are entitled to be viewed favorably for a grant of their petition.

111. Respondent’s Petition Met the Evidentiary Requirements to Demonstrate an Undue Burden

Respondent’s Petition clearly conforms to the standard set out in the *Anglers Order* and its grant should be upheld based on its sufficiency in this regard. As set forth in its Petition, Respondent is a non-profit church organization, the programming for which it seeks an exemption is noncommercial, and it receives no compensation from broadcast of the show. In fact, Respondent pays for airtime for its broadcasts from the donations that it receives from the congregation, and such donations are the sole source of funding for all of the Respondent’s

Save WEAM v. FCC, 808 F. 2d. 113 (D.C. Cir. 1986).

⁹ See *Melody Music v. Federal Communications Commission*, 345 F. 2d 730,732 (D.C. Cir. 1965).

¹⁰ *Anglers Order* at ¶ 11.

operations. As set forth in Respondent's Petition and the budget attached thereto, the timing of production and the budget are therefore already subject to severe constraints. Adding closed captioning would so tax Respondent's already tight production schedule and consume the limited production resources that, without an exemption, it would be forced to cease its broadcasts altogether. It should be noted that, in clarifying the scope of the categorical exemption for locally produced, non-news programming, the Commission declared that it "wanted to ensure that our captioning requirements did not prevent the distribution of the most local public interest programming."¹¹ Respondent's program, "God's Guide for Living Right," includes sermons and lessons of faith which provide discussion of the significant issues of the day in a biblical context. This is precisely the type of programming that should not be forced to cease broadcasting altogether based upon the heavy burden of closed captioning costs.

Respondent has clearly stated the applicable captioning costs in its Petition. These figures represent the results of process of soliciting bids. As set forth in the Petition, Respondent made inquiries of a number of sources in as it assessed its options. As a result of those inquiries, the church determined that the cost of adding closed captioning to its weekly program would be at least \$20,000 per year, whether the church purchased encoding equipment and trained and paid its own personnel or hired an outside party to undertake the captioning. This figure does not include ongoing costs of upgrading the software and maintenance of the equipment, which would add to the total required expenditures even beyond the estimate of \$20,000 per year. That figure alone, however, represents over 18 percent of the total budget for all media outreach efforts. Despite the importance of the weekly program as a part of the church's ministry, clearly,

¹¹ See Closed Captioning and Video Description of Video Programming, Order on Reconsideration, 13 FCC Rcd 19973,20000(1998).

this percentage of the budget is beyond the ability of any donation-supported organization to move money from other areas to support the closed captioning. For example, a review of the budget attached to the Petition shows that the amount that would be needed annually for closed captioning represents almost one-half of the total of the amount budgeted for equipment purchase and replacement plus the amount budgeted for repair and maintenance. Obviously, if half of the amount needed for equipment expenses were to be diverted to closed captioning, it would be impossible to continue forward with the broadcasts.

Respondent acknowledges that it has not extensively solicited contributions specifically for the purpose of supporting closed captioning. Contrary to the position taken by the Commenters in their Opposition, however, petitioners seeking an exemption from closed captioning need not make such a solicitation. In the *Anglers Order*, the CGB overruled a prior decision suggesting that soliciting captioning assistance was a precondition to receiving an undue burden exemption.¹²

As previously stated, the Respondent's Petition on its face supports the Commission's previous grant. Nevertheless, to facilitate the Commission's processing of the instant matter, Respondent now submits additional financial information, further supporting the statements made in the Petition and reiterated here. This evidence makes clear that Respondent unquestionably meets the undue burden standard.

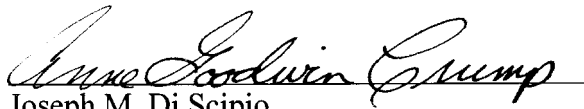
¹² See *Anglers Order* at ¶11.

IV. Conclusion

For the foregoing reasons, Respondent hereby requests that the grant of its Petition be upheld and that the Commenters' objection be dismissed or denied.

Respectfully submitted,

WESTSIDE CHURCH MEDIA MINISTRY

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CERTIFICATE OF SERVICE

I, Kerry A. Allden-Collins, a secretary at the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that true copies of the foregoing "Reply to Opposition" were mailed, U.S. first class mail, postage prepaid on this 4th day of May, 2007, addressed to the following:

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